

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.)
W.A. DREW EDMONDSON, in his)
Capacity as ATTORNEY GENERAL OF)
THE STATE OF OKLAHOMA and)
OKLAHOMA SECRETARY OF THE)
ENVIRONMENT C MILES TOLBERT,)
in his capacity as the TRUSTEE FOR)
NATURAL RESOURCES FOR THE)
STATE OF OKLAHOMA,)

Plaintiffs)

v.)

Case No. 4:05-cv-00329-JOE-SAJ

TYSON FOODS, INC.,)
TYSON POULTRY, INC.,)
TYSON CHICKEN, INC.,)
COBB-VANTRESS, INC.,)
AVIAGEN, INC.,)
CAL-MAINE FOODS, INC.,)
CAL-MAINE FARMS, INC.,)
CARGILL, INC.,)
CARGILL TURKEY PRODUCTION, LLC,)
GEORGE'S, INC.,)
GEORGE'S FARMS, INC.,)
PETERSON FARMS, INC.,)
SIMMONS FOODS, INC.,)
WILLOW BROOK FOODS, INC.,)

Defendants)

ANSWER OF SIMMONS FOODS, INC.

For its Answer Simmons Foods, Inc. states:

The answering Paragraphs are numbered to correspond to those of the First
Amended Complaint.

1. The bulk of this Paragraph contains inflammatory rhetoric to which no answer is required. To the extent that an answer is required, Simmons denies that it is “legally responsible” for the farming activities of its independent contractor growers who own land, raise chickens, and typically perform other agricultural activities in the Illinois River Watershed. Simmons denies that its “practice” is “to store and dispose of chicken litter on the lands within the IRW.” It denies that the land application of chicken litter, standing alone, has caused injury to the waters of the IRW. Simmons denies that “the State of Oklahoma” has brought this action, rather, Drew Edmondson has inappropriately, and in bad faith, initiated the filing of this action after having isolated other responsible Oklahoma policymakers from the decision to bring this litigation. To the extent the allegations of Paragraph 1 require additional response, they are denied.

2. Simmons admits that Plaintiff asserts claims under “CERCLA” but denies that this Court has jurisdiction under CERCLA.

3. Simmons admits that the Illinois River Watershed (“IRW”), including the lands, waters, and sediments therein, is situated, in part, in the Northern District of Oklahoma and in part in the State of Arkansas. The remaining allegations in Paragraph 3 of the Complaint state conclusions of law to which no response is required. To the extent a response is required, Simmons denies the remaining allegations in Paragraph 3.

4. The allegations in Paragraph 4 of the Complaint state conclusions of law to which no response is required. To the extent a response is required, Simmons denies the allegations in Paragraph 4 inasmuch as they relate to Simmons. Simmons lacks sufficient knowledge or information to admit or deny the allegations in Paragraph 4 inasmuch as they relate to the other Defendants.

5. Denied.
6. The allegations of Paragraph 6 are not applicable to this Defendant.
7. The allegations of Paragraph 7 are not applicable to this Defendant.
8. The allegations of Paragraph 8 are not applicable to this Defendant.
9. The allegations of Paragraph 9 are not applicable to this Defendant.
10. The allegations of Paragraph 10 are not applicable to this Defendant.
11. The allegations of Paragraph 11 are not applicable to this Defendant.
12. The allegations of Paragraph 12 are not applicable to this Defendant.
13. The allegations of Paragraph 13 are not applicable to this Defendant.
14. The allegations of Paragraph 14 are not applicable to this Defendant.
15. The allegations of Paragraph 15 are not applicable to this Defendant.
16. The allegations of Paragraph 16 are not applicable to this Defendant.
17. The allegations of Paragraph 17 are not applicable to this Defendant.
18. All allegations of Paragraph 18 are admitted except Simmons denies that it “is responsible for the poultry waste created by these poultry growing operations, its handling and storage, and its disposal on lands within the IRW, . . .” Simmons also denies any resulting injury to the IRW, its biota, lands, waters and sediments.
19. The allegations of Paragraph 19 are inapplicable to this Defendant.
20. No answer is required.
21. No answer is required.
22. Admitted.
23. Admitted except Plaintiff has misstated the name of Barren Fork Creek, calling it a “river.”

24. The allegations of Paragraph 24 are rhetorical and require no answer.

25. The allegations of Paragraph 25 are rhetorical and require no answer.

26. The allegations of Paragraph 26 are rhetorical and require no answer.

27. Admitted.

28. Admitted.

29. The allegations of Paragraph 29 are rhetorical and require no answer. To the extent an answer is required, Defendant Simmons denies that any activities for which it is legally responsible have caused the alleged injury and impairment. Defendant Simmons further states that the land application of chicken litter, a highly regarded organic fertilizer utilized by its independent contractor growers, cattlemen and others within the IRW, standing alone, has not caused any impairment, degradation or injury to the waters of the IRW.

30. Denied.

31. Denied.

32. Simmons admits that it is in the business of producing poultry products.

33. The allegations of Paragraph 33 are rhetorical and require no answer. To the extent they do require an answer, Simmons denies that it is “intimately involved in and controls each stage of the poultry growing process.”

34. Defendant Simmons denies that it “raises its birds itself.” Simmons “raises” no birds. All of the birds it owns and processes within the IRW are “grown” by independent contractor growers or at farms managed by Simmons and owned by others.

35. Denied.

36. Admitted except the term “adulthood” is not understood.

37. Admitted as to this Defendant.

38. Admitted as to this Defendant.

39. Admitted as to this Defendant.

40. Denied as to this Defendant.

41. Admitted as to this Defendant except the allegation of “numerous periodic site visits” to grower’s operations is denied. In fact, out of the approximate 1,000 hours it typically takes to grow any particular flock of birds, Simmons’s employees’ presence at any grower’s farm would typically be less than three to four hours.

42. Denied as to this Defendant.

43. Denied.

44. Denied.

45. Denied as to this Defendant.

46. Admitted, except utilization of the term “waste” is inappropriate.

47. Denied.

48. Simmons denies both knowledge of the allegations contained in Paragraph 48 as well as the allegations themselves.

49. Simmons denies that utilization of the word “waste” is appropriate and admits that poultry litter has been utilized as an inexpensive and effective organic fertilizer by many people within the watershed, principally for the purpose of growing forage for the generation of hay and the propagation of cattle pastures. All of such activities are legal, in accord with Oklahoma law, historically pursued and beneficial to the Oklahoma public.

50. Denied.

- 51. Denied.
- 52. Denied.
- 53. Denied.
- 54. Denied.
- 55. Denied.
- 56. Denied.
- 57. Denied.
- 58. Denied.
- 59. Denied.
- 60. Denied.
- 61. Denied.
- 62. Denied.
- 63. Denied.
- 64. Denied.
- 65. Denied as stated.
- 66. Admitted.
- 67. Admitted.
- 68. Denied.
- 69. Denied.
- 70. The allegations of Paragraph 70 require no response.
- 71. Denied.
- 72. Denied.
- 73. Denied.

74. Denied.

75. Denied.

76. Denied.

77. Denied.

78. The allegations of Paragraph 78 require no response.

79. Simmons lacks sufficient information to admit or deny the allegations of Paragraph 79. Therefore, for purposes of this pleading, they are denied.

80. Denied.

81. Denied.

82. Denied.

83. Denied.

84. Denied.

85. Denied.

86. Denied.

87. Denied.

88. Denied.

89. Denied.

90. The allegations of Paragraph 90 require no response.

91. Receipt of the described letter is admitted. The notion that federal statutes and regulations are “applicable” to the claims of this lawsuit is denied.

92. Denied.

93. Denied.

94. Denied.

- 95. Denied.
- 96. Denied.
- 97. Denied.
- 98. The allegations of Paragraph 98 require no response.
- 99. Denied.
- 100. Denied.
- 101. Denied.
- 102. Denied.
- 103. Denied.
- 104. Denied.
- 105. Denied.
- 106. Denied.
- 107. Denied.
- 108. Denied.
- 109. The allegations of Paragraph 109 require no response.
- 110. Denied.
- 111. Denied.
- 112. Denied.
- 113. Denied.
- 114. Denied.
- 115. Denied.
- 116. Denied.
- 117. Denied.

118. Denied.

119. The allegations of Paragraph 119 require no response.

120. Denied.

121. Denied.

122. Denied.

123. Denied.

124. Denied.

125. Denied.

126. Denied.

127. Denied.

128. The allegations of Paragraph 128 require no response.

129. Denied.

130. Denied.

131. Denied.

132. Denied.

133. The allegations of Paragraph 133 require no response.

134. Denied.

135. Denied.

136. Denied.

137. The allegations of Paragraph 137 require no response.

138. Denied.

139. Denied.

140. The allegations of Paragraph 140 require no response.

141. Denied.

142. Denied.

143. Denied.

144. Denied.

145. Denied.

146. Denied.

147. Denied.

AFFIRMATIVE DEFENSES

148. Plaintiffs' Complaint fails to state a claim upon which relief may be granted and must therefore be dismissed.

149. Plaintiffs' Complaint fails to state a claim for relief under CERCLA in that it does not allege the release or threat of release of any hazardous substance.

150. Plaintiffs' Complaint fails to state a claim for relief under CERCLA because it does not allege the release or threat of release of any substance that is not subject to the fertilizer exemption of Section 101(22) of CERCLA, 42 U.S.C. §9601(22).

151. Plaintiffs' Complaint fails to state a claim for relief under CERCLA because it does not allege the release or threat of any substance that is not subject to the exemption for federally permitted releases provided by Section 101(10) of CERCLA, 42 U.S.C. §9601(10).

152. Simmons Foods, Inc. has no liability under CERCLA in this matter because it does not fall within any of the four classes of persons who may have liability under Section 107(a) of CERCLA.

153. Simmons Foods denies that it is a responsible party under CERCLA; however, if Simmons Foods, Inc. did discharge any amount of hazardous substances, the amounts were insignificant and, therefore, under the principles of *de minimis non curate lex*, the CERCLA count of the Complaint should be dismissed.

154. The Court has no jurisdiction over Plaintiffs' CERCLA claim, and the Plaintiffs are not entitled to recovery under CERCLA of any costs or expenses allegedly incurred by them in response to the alleged releases and discharges, because Plaintiffs have not complied with Section 113(1) of CERCLA and because any costs or expenses incurred by Plaintiffs were neither necessary nor incurred consistent with the National Contingency Plan.

155. Plaintiffs are not entitled to recovery under CERCLA of any costs or expenses allegedly incurred by them in response to the alleged releases and discharges of wastes because the alleged releases and discharges occurred, if at all, through the acts or omissions of a third party or parties other than an employee or agent of Simmons Foods, Inc. and other than a third party whose acts or omissions occurred in connection with a contractual relationship with Simmons Foods, Inc., and Simmons Foods, Inc. exercised due care with respect to the wastes, taking their characteristics into consideration in light of relevant facts and circumstances, and taking precautions against foreseeable acts and omissions of such third party or parties and the consequences that could foreseeably result from such acts and omissions.

156. Any "response costs and expenses" allegedly incurred by Plaintiffs do not constitute costs of "response" as that term is defined by Section 101(25) of CERCLA, 42 USCA 9601(25) and any such costs and expenses were not incurred consistent with the

national contingency plan promulgated by the United States Environmental Protection Agency (“USEPA”) pursuant to Section 105 of CERCLA, 42 USCA 9605.

157. Under the Supreme Court’s decision in *U.S. v. Key Tronic Corp.*, the Plaintiffs cannot recover those attorneys’ fees relating to their CERCLA claim.

158. The purported causes of the alleged contamination are divisible and there is a reasonable basis for apportioning the alleged harm. Accordingly, there is no basis for joint and several liability under CERCLA.

159. All chicken litter utilized as an organic fertilizer and generated by growers having contracts with Simmons Foods, Inc. is, on information and belief, disposed of through land application and other means that are fully in compliance with applicable law.

160. The products referenced in the Complaint are consumer products as defined in §101(9) of CERCLA.

161. The activities described in the Complaint did not involve the arrangement for treatment or disposal of hazardous substances as defined by §107(a)(3) of CERCLA.

162. Simmons Foods, Inc. has not directly, or indirectly, disposed of any “hazardous waste” as that term is defined in the Solid Waste Disposal Act, as incorporated into CERCLA.

163. Plaintiffs have failed to mitigate their damages, thereby barring or diminishing any recovery.

164. Conduct of Simmons Foods, Inc. was not the proximate cause of any injuries or damages suffered by Plaintiffs.

165. The allegations set forth in Plaintiffs' Complaint do not establish a violation of any state or federal statute.

166. The conduct and conditions alleged by Plaintiffs in their Complaint do not constitute a recurring and permanent nuisance.

167. The Plaintiffs' nuisance claims are barred because Simmons Foods, Inc., as well as the Growers, have made reasonable use of their properties and the social utility of utilizing poultry litter as fertilizer outweighs Plaintiffs' unfounded claim of harm.

168. The Plaintiffs do not state a cause of action for nuisance because the Plaintiffs have neither alleged nor suffered a particularized injury.

169. Plaintiffs' injuries and damages, if any, are the result of their own acts, omissions, carelessness and/or negligence, thereby barring or diminishing any recovery. Plaintiffs' negligence establishes their duty to prove their allegations against each of these Defendants severally.

170. Plaintiffs' injuries and damages, if any, are the result of the negligence or other fault of third persons or entities over whom Simmons Foods, Inc. has no control.

171. None of the actions alleged to have been taken by Simmons Foods, Inc. constitutes negligence per se.

172. Plaintiffs' injuries and damages, if any, are the result of acts of God and/or other natural or artificial factors beyond Simmons Foods, Inc.'s control.

173. The Plaintiffs' claims are barred under the doctrine of assumed or incurred risks. 174. Plaintiffs' claims are barred by the applicable statutes of limitation.

175. The issues and/or claims asserted by Plaintiffs are barred by the doctrines of laches, waiver and unclean hands.

176. Simmons Foods, Inc. has not been unjustly enriched by any conduct alleged.

177. Growers associated with Simmons Foods, Inc. are not, as a matter of law, agents or employees of the company.

178. Simmons Foods, Inc. neither owned nor operated the Growers' facilities.

179. Simmons Foods, Inc. has neither the ability nor authority to control or affect the timing, manner and location of the application of litter by the Growers.

180. To the extent Plaintiffs attempt to characterize the time period encompassed by the allegations in the Complaint as a period of continuing violations, said characterization is incorrect and should be stricken and dismissed.

181. All allegations in the Complaint which attempt to assert Plaintiffs' right to recovery due to purported violations, directly or indirectly, of the general water quality criteria in the Oklahoma Administrative Code should be stricken and dismissed for failure to state a claim, because: (a) the general criteria are not enforceable in that they are void for vagueness; (b) no scientific assessment has been performed to determine whether the general criteria were violated; and (c) no showing has been made or can be made to establish that Simmons Foods, Inc. caused violations of the general criteria.

182. To the extent Plaintiffs are asserting any claims due to purported violations of numeric or specific water quality criteria, such allegations should be stricken and dismissed for failure to state a claim because the numeric or specific criteria do not apply.

183. No relief should be awarded to Plaintiffs because neither Plaintiffs nor any other agency has prepared Total Maximum Daily Loadings pursuant to the applicable

authorities of the Clean Water Act allocating loadings and/or waste loads for any of the water bodies referenced in the Complaint.

184. No relief should be awarded to Plaintiffs because Plaintiffs have not and cannot establish that any applicable water quality standard has been violated by Simmons Foods, Inc. or that Simmons Foods, Inc. has caused pollution to the water supply.

185. Damages should not be assessed against Simmons Foods, Inc. because, at all times relevant hereto, the potential for harm to Plaintiffs' water supply and the extent of deviation from any applicable requirements, if either could be shown, do not support an award of damages.

186. Plaintiffs cannot establish any compensable damages for the claims asserted in their Complaint.

187. No injunctive relief should be awarded because Plaintiffs have an adequate remedy at law.

188. No injunctive relief should be awarded because Plaintiffs have not suffered irreparable harm.

189. No injunctive relief should be awarded because Plaintiffs have not sued indispensable parties, i.e. all nutrient contributors in the watershed.

190. Based upon the allegations made by Plaintiffs in their Complaint, no award of punitive damages is justified.

191. An award of punitive damages would violate provisions of the Constitution of the United States, including, but not limited to: Article I, Section 8; Article I, Section 9; Article I, Section 10; Article III, Section 2; and the Fifth, Sixth, Eighth and Fourteenth Amendments.

192. Plaintiffs have failed to join an indispensable party or parties.

193. Simmons Foods, Inc. adopts and incorporates by reference all affirmative defenses presently or subsequently asserted by any of its co-defendants.

193. Any recovery by Plaintiffs cannot be utilized to pay contingency attorney fees.

194. To the extent that liability under the Complaint is predicated on the claim that independent poultry farmers are or were the servants, employees or agents of Simmons, all such claims are preempted by the provisions of the Packers and Stockyards Act, 7 U.S.C. §181, *et seq.*

195. The state common law claims of nuisance, trespass and unjust enrichment are precluded by the existence and provisions of the Oklahoma Registered Poultry Feeding Operations Act, OKLA. STAT., tit. 2 §9-201, *et seq.* and the Oklahoma Concentrated Animal Feeding Operations Act, OKLA. STAT., tit. 2 §9-201, *et seq.*

196. The Complaint's claim for "cost recovery" under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601, *et seq.*, is barred by the Plaintiffs' status as a potentially responsible party.

197. The state law claims in the First Amended Complaint are barred under the doctrines of state sovereignty and comity. The claims amount to an impermissible attempt by the State of Oklahoma to use its own common law tort theories of liability to restrict or modify the regulatory authority of the State of Arkansas, and to impose economic sanctions on the Defendants with the intent of changing Defendants' lawful conduct in the State of Arkansas.

198. The common law claims asserted in Counts 4, 6, and 10 of the First Amended Complaint are precluded by Oklahoma's statutory and regulatory programs governing the conduct at issue.

199. The common law claims asserted in Counts 7, 8, and 9 are barred under the doctrine of primary jurisdiction.

200. Simmons is not associated with or affiliated with any of the other Defendants. Simmons has not otherwise acted in concert or combination with any other Defendant. The First Amended Complaint improperly attempts to combine Simmons with the other Defendants under the designation, "Poultry Integrators." Simmons is not responsible for the actions of any of the other Defendants herein.

RESERVATION OF RIGHTS

201. Simmons Foods, Inc. reserves the right to assert any and all additional affirmative defenses which discovery may reveal to be appropriate.

202. Simmons Foods, Inc. reserves the right to amend its answer or otherwise plead in response to Plaintiffs' Complaint.

WHEREFORE, having fully answered, Separate Defendant, Simmons Foods, Inc., moves the Court for dismissal of the Complaint; for its costs; for its attorneys' fees; and for all other things to which it might show itself entitled.

s/John R. Elrod

John R. Elrod
AR Bar Number 71026
Vicki Bronson
OK Bar Number 20574
Attorney for Simmons Foods, Inc.
CONNER & WINTERS, LLP
100 West Center St., Suite 200
Fayetteville, AR 72701
(479) 582-5711
(479) 587-1426 (facsimile)

and

D. Richard Funk
OK Bar No. 13070
Bruce W. Freeman
OK Bar No. 10812
Attorneys for Simmons Foods, Inc.
CONNER & WINTERS, LLP
3700 First Place Tower
15 E. Fifth Street
Tulsa, OK 74103-4344
(918) 586-5711
(918) 586-8547 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2005, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

C Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118

Douglas Allen Wilson
Melvin David Riggs
Richard T. Garren
Sharon K. Weaver
Riggs Abney Neal Turpen Orbison
& Lewis
502 W. 6th St.
Tulsa, OK 74119-1010

William H. Narwold
Motley Rice LLC
20 Church St., 17th Floor
Hartford, CT 06103

Robert Allen Nance
Dorothy Sharon Gentry
Riggs Abney
5801 N. Broadway
Suite 101
Oklahoma City, OK 73118

Elizabeth C. Ward
Frederick C. Baker
Motley Rice LLC
28 Bridgeside Blvd.
Mount Pleasant, SC 29464

Terry West
The West Law Firm
124 W. Highland St.
Shawnee, OK 74801

David Phillip Page
James Randall Miller
Louis Werner Bullock
Miller Keffer & Bullock
222 S. Kenosha
Tulsa, OK 74120-2421

W.A. Drew Edmondson
Office of the Attorney General
State of Oklahoma
2300 N. Lincoln Blvd.
Suite 112
Oklahoma City, OK 73105

Thomas C. Green
Mark D. Hopson
Timothy K. Webster
Jay T. Jorgensen
Sidley, Austin Brown & Wood, LLP
1501 K. Street, N.W.
Washington, D.C. 20005-1401

Patrick Ryan
Stephen Jantzen
Ryan, Whaley & Coldiron
900 Robinson Renaissance
119 North Robinson, Suite 900
Oklahoma City, OK 73102

Gary Weeks
James W. Graves
Bassett Law Firm
P.O. Box 3618
Fayetteville, AR 72702-3618

Robert E. Sanders
Stephen Williams
Young, Williams, Henderson & Fusilier
P.O. Box 23059
Jackson, MS 39225-3059

Raymond Thomas Lay
Kerr Irvine Rhodes & Ables
201 Robert S. Kerr Ave.
Suite 600
Oklahoma City, OK 73102

Robert W. George
Michael R. Bond
Kutak Rock, LLP
The Three Sisters Building
214 West Dickson
Fayetteville, AR 72701

John H. Tucker
Theresa Noble Hill
Rodes, Hieronymus, Jones, Tucker &
Gable, P.L.L.C.
100 West Fifth St., Suite 400
Tulsa, OK 74121-1100

A. Scott McDaniel
Chris A. Paul
Nicole Longwell
Joyce, Paul & McDaniel, P.C.
1717 S. Boulder Ave., Suite 200
Tulsa, OK 74119

Martin Allen Brown
Martin A. Brown PC
6128 E. 38th St.
Suite 312
Tulsa, OK 74135

and I hereby certify that I have mailed the document by the United States Postal Service
to the following non CM/ECF participants:

Eric E. Boyd
Seyfarth Shaw LLP
55 E. Monroe St.
Suite 4200
Chicago, IL 60603-5803

Henderson Brown
Timothy Jones
Tyson Foods, Inc.
2210 West Oaklawn Dr.
Springdale, AR 72762

This the 3rd day of October, 2005

s/John R. Elrod

John R. Elrod